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No. 90-1683

In the Supreme Court of the United States

OCTOBER TERM, 1990

NORMAN HARTNESS, ET AL., PETITIONERS

v.

GEORGE HERBERT WALKER BUSH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
LOWELL V. STURGILL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits random drug testing of employees of the Executive Office of the President (EOP) who hold secret-level national security clearances.

2. Whether respondents' claim that certain of the EOP employees were included in the random testing pool because they hold secret-level national security clearances is a post hoc rationalization that is invalid under the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 919 F.2d 170. The opinions of the district court (Pet. App. 26a-52a, 58a-62a) are reported at 712 F. Supp. 986 and 751 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1990. A petition for rehearing was denied on February 4, 1991. The petition for a writ of certiorari was filed on May 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), the Executive Office of the President (EOP) issued its Drug-Free Workplace Plan in July 1988. The Plan applies to the White House Office, the Office of the Vice President, and several separate agencies that bear a close relationship to the work of the President. Pet. App. 5a.[1] EOP components form the President's staff institution, providing day-to-day operational support directly for the President and the Vice-President.

To achieve a drug-free workplace, the EOP Plan authorizes several forms of drug testing, including reasonable suspicion testing, applicant testing, accident or unsafe practice testing, voluntary testing, random testing, and follow-up testing. See EOP Plan. Random testing applies only to employees who hold sensitive positions. Each component agency is responsible for determining which of its employees hold such positions. Pet. App. 5a. Employees have the right to file an administrative appeal before testing occurs if they feel that their position has been erroneously designated as sensitive. EOP Plan 27.

The procedures for obtaining urine specimens and for testing the specimens under the EOP Plan are not materially different from the procedures upheld in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 661-663, 672 n.2 (1989) (testing procedures "significantly minimize" a

[1] A list of the EOP component agencies to which the EOP Plan applies is found in Section E (Scope) of the Introduction to the EOP Plan. App. A, at 12. After the EOP Plan was issued, four additional agencies were added to the list of EOP agencies subject to the Plan: the Office of National Drug Control Policy, the National Space Council, the President's Intelligence Oversight Board, and the President's Foreign Intelligence Advisory Board. One of the EOP agencies listed in the EOP Plan has expired: the White House Conference for a Drug-Free America.

drug testing program's intrusion on the reasonable privacy expectations of employees). For example, the EOP Plan requires advance notice of random testing at least 30 days before testing is to occur, and specifies that employees may supply their specimens unobserved and in private, unless collection site personnel have reason to believe that the employee may alter or substitute the specimen to be provided. EOP Plan 27, 30; HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs § 2.2(f)(7) and (16) (1988). A drug test may be reported as positive only if it is confirmed by a Medical Review Officer, a licensed physician who must examine alternative medical explanations for a positive test result. HHS Guidelines § 2.7.

2. Petitioners are 23 employees who work in one of three EOP component agencies: the Office of Administration, the Office of Management and Budget, and the Office of the United States Trade Representative. Each plaintiff holds a position that has been identified as subject to random testing. Fourteen petitioners hold "top secret" national security clearances; eight petitioners hold "secret" national security clearances. The remaining petitioner does not hold a national security clearance. Because she does not hold at least a secret-level clearance, she was not the subject of this appeal.[2]

After petitioners received individual notices informing them that they could be randomly tested within 30 days, petitioners filed the present lawsuit to challenge the Plan's random testing requirement. Shortly thereafter, the district court issued a preliminary injunction barring the three EOP agencies at issue from conducting random testing of peti-

[2] The remaining plaintiff was identified for random drug testing because she holds a pass that allows her access to the Old Executive Office Building and because she has access to sensitive information. After the district court, issued the order in question, six plaintiffs left the government, one withdrew from this case, and one voluntarily downgraded his security clearance level from top secret to secret.

tioners, except for those who hold a White House pass.[3] Pet. App. 51a. Subsequently, the district court vacated the injunction in part to allow random testing of petitioners who hold top secret clearances, based on an intervening decision upholding random testing of Department of Justice attorneys who hold top secret clearances. *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990). The district court refused, however, to permit random testing of employees who hold secret national security clearances. Pet. App. 62a.[4]

3. The EOP agencies at issue appealed the district court's refusal to allow testing of "secret" clearance-holders, and the court of appeals reversed the district court in that respect by a divided vote. Pet. App. 4a-25a. The majority noted that, under its decision in *Harmon* v. *Thornburgh*, persons who hold a top secret security clearance can be subjected to random drug testing. The majority concluded that this Court's decision in *Von Raab* does not prohibit an agency from concluding that persons holding secret-level national security clearances may be subjected to random drug testing regardless of whether they are likely to use classified infor-

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[3] A White House pass permits access to the entire White House complex, including the West and East Wings of the White House, the Old Executive Office Building (OEOB), the New Executive Office Building (NEOB), and the Winder Building. The Secret Service also issues two other kinds of passes. The OEOB pass permits access to the OEOB, the NEOB, and the Winder Building. The NEOB pass permits access to the NEOB and the Winder Building.

[4] There are three levels of national security classification under Exec. Order No. 12,356, 3 C.F.R. 166 (1982 comp.). "Top secret" information is information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." *Id.* § 1.1(a)(1). "Secret" information is information "the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security." *Id.* § 1.1(a)(2). "Confidential" information is information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." *Id.* § 1.1(a)(3). See Pet. App. 6a n.1.

mation and regardless of how closely they are supervised. The majority also found no material distinction for Fourth Amendment purposes between "secret" and "top secret" security clearances, and, for that reason, held that it is reasonable under the Fourth Amendment for the EOP to test all employees who hold secret-level security clearances. *Id.* at 9a-10a; *id.* at 11a (Mikva, C.J., concurring).

Judge Edwards dissented. Pet. App. 12a-25a. He disagreed with the majority that persons holding a secret security clearance could be subjected to random drug testing. In his view, to answer that question a court must follow a "case-by-case, highly contextual approach," requiring close consideration of factors such as "the probability that tested employees will gain actual access to sensitive information and the degree to which they are already supervised on the job," *id.* at 21a.

ARGUMENT

1. Petitioners maintain that the court of appeals erred in upholding the drug testing program adopted for the Executive Office of the President and challenged in this case. That claim does not warrant review by this Court.

a. There is no conflict among the circuits on the first question presented by this case. Several courts of appeals have approved random testing of government employees who hold sensitive positions of various types. See, *e.g.*, *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir.) (police officers who are required to carry firearms), cert. denied, 493 U.S. 963 (1989); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees who have access to chemical warfare material); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers who come in regular contact with prisoners); *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562 (8th

Cir. 1988) (nuclear power plant employees); *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990) (air traffic controllers, flight crew members, and certain other employees holding safety-related positions in the airline industry), cert. denied, 111 S. Ct. 954 (1991); *Harmon* v. *Thornburgh*, *supra* (Department of Justice lawyers who have top secret national security clearances). The decision below is fully consistent with those cases.

b. The decision below is also correct. In *Von Raab*, this Court sustained against a Fourth Amendment challenge a drug testing program requiring Customs Service employees to submit to urinalysis if they sought a transfer or promotion to positions in drug interdiction or law enforcement efforts, or that required employees to carry firearms. The Court ruled that, on balance, the government's interests in ensuring that front-line drug interdiction personnel are physically fit and have an unimpeachable integrity outweighs the privacy interests of the affected Customs Service employees. 489 U.S. at 665-677. Similarly, in *Harmon* v. *Thornburgh*, the D.C. Circuit concluded that Department of Justice employees with top secret security clearances can be required to undergo random urinalysis tests even if such employees do not regularly (if at all) use such classified information. 878 F.2d at 491-492. Relying on this Court's recognition in *Von Raab* that the federal government is entitled to safeguard sensitive information against disclosure, see 489 U.S. at 677, the court in *Harmon* held that employees who have access to top secret information can be required to undergo drug testing. 878 F.2d at 491-493. *Harmon* also concluded that if submission to drug testing can be made a requirement for obtaining access to top secret information, it also was "reasonable" under the Fourth Amendment to make drug testing a requirement to hold a top secret security clearance. "The whole point of granting top secret security clearances in advance is to provide

flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." *Id.* at 492.

In this case, the court of appeals determined that the same principles apply in the case of employees holding secret national security clearances. The difference between the two classification levels, the court explained, turned on the degree of damage to the national security that could result from the improper disclosure of classified information. Pet. App. 6a n.1, 9a. That ruling is correct. Information is classified as "top secret" if its disclosure would cause "exceptionally grave" damage to the national security, while information is classified as "secret" if its disclosure would cause "serious" damage to the national security. See Exec. Order No. 12,356, §§ 1(a)(1) and (2), 3 C.F.R. 166 (1982 comp.). As the court of appeals correctly determined, Pet. App. 9a, that distinction is not significant for Fourth Amendment purposes. In fact, this Court has recognized that the government has a compelling interest in protecting against the disclosure of either type of information. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 521 n.1 (1988) (upholding the government's right to revoke a national security clearance held by an employee whose job was defined to include "[a]ccess to Secret or Confidential information"); *Snepp* v. *United States*, 444 U.S. 507, 509-516 & n.3 (1980) (upholding the CIA's authority to require former employees to submit publications for preclearance in order to prevent the disclosure of national security material that was classified at any level); *United States* v. *Reynolds*, 345 U.S. 1 (1953) (upholding executive privilege claim without distinguishing among levels of classification); *Totten* v. *United States*, 92 U.S. 105, 106 (1875). Those decisions show that the government has a compelling interest in protecting national security materials at every classification level.

Petitioners do not claim that the court of appeals erred in that regard. Instead, their principal argument is that the court of appeals did not follow the analysis that they believe is required by *Von Raab*, because that court did not consider whether petitioners are likely to have access to secret national security information in their daily work and whether petitioners work in an unsupervised environment. Pet. 11-16. That claim does not warrant further review.

In *Von Raab*, this Court acknowledged that the government has a compelling interest in safeguarding against improper disclosure "truly sensitive information," 489 U.S. at 677, and that employees who seek promotions to positions where they would handle "sensitive information" can be required to submit to such tests, particularly if the employees already must undergo other intrusions, such as background investigations, which reduce their expectation of privacy. *Id.* at 677-678. But the Court found it unclear whether all of the covered Customs Service employees, which included "Animal Caretaker[s]" and "Baggage Clerk[s]," *id.* at 678, were likely to gain access to sensitive information. The Court therefore remanded the case to the lower courts to perform that inquiry, as well as to determine the privacy expectations that the employees otherwise enjoyed and the degree of supervision to which they are subject. *Ibid.*

Contrary to petitioners' claim, *Von Raab* does not prohibit an agency from requiring employees who hold top secret or secret national security clearances from having to undergo drug testing. Given some of the positions designated for drug testing in *Von Raab*, the record in that case left some question whether the category of employees to be tested had been defined "more broadly than necessary to meet the purposes of" the Customs Service's testing program. 489 U.S. at 678. In this case, by contrast, the EOP agencies in question have determined that the petitioners who are the subject of this appeal must be required to

undergo random drug testing because they hold (at least) secret-level clearances, regardless of whether they currently handle classified information or whether they work in an unsupervised environment. Thus, unlike in *Von Raab*, there is no uncertainty here with respect to *how* employees have been selected for random testing, and no reason for concern that employees will be tested who do not qualify for access to sensitive information. Beyond that, petitioners do not challenge the court of appeals' reasons for concluding that the covered employees' likelihood of access to classified information and the degree of supervision they have in their work environment need not be given independent weight in the balance under *Von Raab*. See Pet. App. 8a-9a. Under these circumstances, further review of petitioners' claim is not warranted.

2. Petitioners also maintain that review is warranted because the government's proffered justification for testing employees with secret-level security clearances is "a post-hoc rationalization" of the type that is invalid under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Pet. 16-18. That factbound claim, which the court of appeals did not address, is insubstantial.

As the D.C. Circuit recognized in *Harmon* v. *Thornburgh*, 878 F.2d at 494-495 n.19, drug testing plans like the one challenged in this case are exempt from the procedural requirements of the APA because they are "paradigmatic examples of 'matter[s] relating to agency management or personnel,' *see* 5 U.S.C. § 553(a)(2)." In addition, the respondent agencies have made it clear in this litigation that the petitioners who are the subject of this appeal have been identified for random drug testing because they hold secret security clearances. The decision to include secret-level security clearance employees in the pool of individuals subject to random drug testing was a policy decision made by appropriate agency personnel, not a post-hoc rationaliza-

tion of an agency rule or decision. Nothing more is necessary to support an agency's employment-related actions of this type.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
LOWELL V. STURGILL, JR.
Attorneys

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